

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION** RECEIVED
WASHINGTON, DC 20554

JAN 19 1999

In the Matter of)	
)	
1998 Biennial Regulatory Review --)	MM Docket No. 98-43
Streamlining of Mass Media Applications,)	
Rules and Processes)	
)	
Policies and Rules Regarding)	MM Docket No. 94-149
Minority and Female Ownership of)	
Mass Media Facilities)	

PETITION FOR RECONSIDERATION

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INC.**

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Dated: January 19, 1999

SUMMARY

The FCC's recent *Report and Order* in MM Docket 98-43 applies a new construction permit extension policy to holders of existing permits, but treats disparately those permits falling on one side or other of a date three years from grant of the original authorization. That decision warrants reconsideration.

It appears that the Commission may not have intended its New Extension Policy to have draconian effect on parties who have held their permits for three or more years. In the *Notice of Proposed Rulemaking* launching the proceeding, the FCC tentatively decided to apply its existing Part 73 extension policies to permits beyond their initial term. This approach was necessary, said the Commission, because attempting to apply the new rules to permittees in this class would be "administratively unworkable."

Ostensibly acknowledging that problem, but anxious nonetheless to simplify its processes, the Commission in the *Report and Order* decided on what it deemed a "fairer approach" that would ensure an extended life to some permittees beyond their initial construction phase. Unfortunately, that procedure does not take into account anomalies which, unless adequately resolved, conflict both with the FCC's stated objectives in MM Docket 98-43 and with the requirements of the Administrative Procedure Act.

The FCC should reconsider this portion of the *Report and Order* so that these errors can be rectified.

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To: The Commission		

PETITION FOR RECONSIDERATION

Brunson Communications, Inc. ("Brunson"), by its attorneys, hereby petitions for reconsideration in part of the *Report and Order* released November 25, 1998, in the captioned rulemaking proceeding (FCC 98-281) ("*Report and Order*").¹ Brunson's concerns relate principally to the amendment of 47 C.F.R. 73.3534, the rule governing extensions of construction deadlines. We refer to this amendment as the "New Extension Policy." Reconsideration on the limited basis explained below will bring the revised policy into full harmony with the *Report and Order's* stated purposes. Accordingly, reconsideration is warranted.

I. REGULATORY BACKGROUND

1. *The NPRM's Version of the New Extension Policy.* The public interest predicate of MM Docket 98-43 is the salutary effect of "streamlining" the Mass Media Bureau's

¹ 63 *Fed. Reg.* 70040, December 18, 1998.

rules and policies. In the notice² initiating this proceeding, the FCC proposed to simplify its procedures by “reducing applicant and licensee burdens” and “increasing the efficiency of application processing.” *NPRM*, at ¶¶ 1 - 3 . As part of that effort, the Commission devised to modify its consideration permit extension procedures in order “to reduce the necessity for extensions.” *NPRM*, ¶¶51 - 68. This would be achieved “by increasing the authorized construction period” so as to “allow sufficient time for a diligent permittee to complete construction of a facility, even if the permittee encounters significant construction difficulties.” *Ibid*. Under the modified procedure the FCC would “issue all construction permits for a uniform three-year term” and “exclude from the calculation of this term periods during which the permit itself is the subject of an administrative or judicial review or where construction delays have been caused by an ‘act of God.’” *Ibid*.

In the *NPRM*, the FCC tentatively concluded that the New Extension Policy would *not* apply to construction permits that are beyond their initial term pursuant to an extension of the construction deadline. Instead, the FCC proposed that “the rules regarding construction permits, and extensions thereof, that we adopt in this rulemaking proceeding be applied to *any construction permit that is currently in its initial construction period*.” *NPRM*, at ¶68 (emphasis added). The *NPRM* expressly limited the proposed changes to permits in their initial construction phase. Thus, by definition, the New Extension Policy would not affect construction permits which had a different status -- for

² *Notice of Proposed Rulemaking*, 13 FCC Rcd 11349 (1998) (“*NPRM*”).

example, a permit valid under a current extension, or a permit valid by virtue of the pendency of a timely filed extension application. Permits in these categories would continue to be governed by the "one in three" standard of extant Section 73.3534(b).

2. *The Rationale for Limiting the Scope of the New Extension Policy.* In the *NPRM*, the FCC explained its rationale for excluding from the scope of the New Extension Policy permits that are beyond their initial construction period.

We believe, however, that it would be *administratively unworkable* to apply the proposed rules to construction permits that are already beyond their initial construction periods (whether through extension, assignment, transfer of control, or modification). Because many of these permits have already been afforded a construction period close to (or, in many instances, in excess of) the three-year term proposed in this *Notice*, we propose *to continue to apply the rules as they exist today* to permits outside their initial periods.

We invite comment on the tentative conclusion that it is *more appropriate to continue to apply our current rules* to construction permits that are beyond their initial periods.

NPRM, at ¶68 (emphasis added).

Significantly, the FCC's tentative decision evidently was animated by a concern for existing permittees caught in the transition, if the New Extension Policy were applied to them in a mechanical fashion. If, as the FCC posited, a class of permittees had already held their authorizations for close to or more than three years, the retroactive effect of applying the New Extension Policy to them could mean the automatic forfeiture of their permits, regardless of the merits of a particular permittee's circumstances. That state of affairs, the FCC concluded, would be "administratively unworkable," too complicated to manage fairly by a consistent standard. The FCC no doubt envisaged, for example, the

case of a permittee on the verge of inaugurating a new broadcast service, only to forfeit its permit because it happened to have held it for “three years and a day.” Not only would this result be inequitable to the permittee, who typically would have invested substantial money and time toward constructing the station, but it would delay the new service indefinitely. Because that chain of events could not be said to promote the objectives of the proceeding or to align with the rationality standard of the Administrative Procedure Act (“APA”), the FCC wisely proposed that the New Extension Policy would not apply to permits outside their initial term. Rather, permittees in that class would be evaluated under the extant version of Section 73.3534, according to the discretion and case by case flexibility inherent in that rule.

3. *The Report and Order’s Version of the New Extension Policy.* In the *Report and Order*, the FCC adopted its original proposal to apply the New Extension Policy to any construction permit that is within its initial construction period. Accordingly, the construction period for all “eligible permittees” would be “increased to afford each an initial three year term, and extension of such permits would be governed by the strict criteria outlined here.” *Report and Order*, at ¶80.

As to permits beyond their initial construction term, however, the FCC abandoned its earlier view in favor of what it deemed to be “a fairer approach.”

Although we proposed in the *Notice* that these rules apply to any construction permit that is within its initial construction period at the time these rules are adopted, we conclude that *the fairer approach* is to allow *all permittees* to take advantage of the extended construction period in the manner set forth below.

Report and Order, at ¶80 (emphasis added). Specifically, permits would be classified as follows:

(1) *Construction permit is in its initial construction period and/or an initial extension request is pending.* Construction permits will be automatically extended to three years from the date of an initial grant upon a timely request from the permittee. In addition, a permittee may submit a showing requesting additional time based on the tolling procedures adopted herein.

(2) *Permittee is authorized to construct under an extension of its construction permit.* The current extension, as an outstanding permit, will be extended to three years from the initial grant of the construction permit....” In addition, a permittee may submit a showing requesting additional time based on the tolling procedures adopted herein. No additional time will be granted when the permittee has had, in all, at least three unencumbered years to construct. The construction permit will be subject to automatic forfeiture at the expiration of the last extension.

* * *

Id. at ¶89. While we commend the Commission for electing what it took to be “a fairer approach,” we are concerned that the *Report and Order’s* resolution of this critical issue does not fairly account for a variety of fact patterns which show, under any reasonable interpretation, that a permittee’s efforts to construct have been hindered by elements beyond its control.

II. ARGUMENT

A. Reconsideration Will Afford the FCC the Opportunity to Correct Unintended Consequences of the New Extension Policy.

The wording of the *Report and Order* would appear to articulate a standard that demarcates the universe of existing permittees solely according to where a permittee falls

on the three year time line, regardless of any other factors the FCC previously has viewed as sufficiently compelling to justify an extension of a construction deadline. This rendering of the *Report and Order*, if accurate, would not be defensible. It would, for example, entail outcomes that could not be rationally harmonized. Suppose Permittee A, by the fortuity of the timing of its original grant, has held its authorization two and a half years. Permittee B, whose efforts to construct have been substantial and earnest, and is on the brink of initiating service, has held its authorization for three and a half years. Where does the sword of Damocles fall? One reading of the *Report and Order* is that Permittee B forfeits its authorization because it is on the wrong side of the three year mark. Interpreted in this fashion, the New Extension Policy would cause grave inequities and senseless delays in new broadcast service.

Obviously, this result would not be the "fairer approach" the FCC intended. Nor would it be consistent with the FCC's stated objectives in MM Docket 98-43. The source of the confusion that creates this untenable anomaly is the use of a time line that cannot be divided in a principled way. Given two permittees of equal merit, the FCC must ensure -- on pain of acting arbitrarily -- that they are treated similarly. The *Report and Order's* version of the New Extension Policy compromises that requirement.

Unlike the proposal set forth in the *NPRM*, the *Report and Order's* formula is void of meaningful criteria to make that judgment.

Presumably it is for this reason that the FCC in the *NPRM* characterized as "administratively unworkable" a rule that would uncritically apply the New Extension

Policy to permits beyond the initial construction term. Nor is there anything in the *Report and Order* to suggest that the FCC rejected its earlier sense of the matter as wrong-headed. Rather, the *Report and Order* reads as if the FCC had meant to adopt a policy that would *accommodate* permittees in this status -- not put them at near-fatal risk -- while at the same time simplifying the procedures for doing so. The problem is that, as it is framed in the *Report and Order*, the resolution does not achieve that result in a coherent way.

Given these analytical problems on one hand, and the tenor of the FCC's discussion in the *Report and Order* on the other, it is difficult to believe that the FCC intended that the New Extension Policy be interpreted literally. More likely is that the Commission simply did not focus in detail on the ramifications of its decision as drafted. Reconsideration of the *Report and Order* will provide the FCC with the opportunity to correct and clarify the New Extension Policy with respect to this narrow issue.

B. If the FCC In Fact Intended the Draconian Consequences that Flow from a Literal Interpretation of the New Extension Policy, the Policy Is Not Defensible.

If, contrary to our assumptions concerning the FCC's understanding of the ramifications of the New Extension Policy, the Commission actually meant to hinge a permittee's life or death on "which side" of the three year mark it falls, this approach is problematic for several reasons.

First, as we discussed above, it is difficult to see how this version of the New Extension Policy can avoid the criticism of irrationality. It is fundamental that an

administrative agency “must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, however, that connection would be illusory. Without a principled basis for distinguishing permittees who lie at different points of the time line, the divisions cannot occur rationally: They are not susceptible in principle to any kind of check or meaningful review.

Second, the New Extension Policy interpreted in this way has an undermining effect on other, unrelated arguments in the *Report and Order*. For example, earlier in the *Report and Order* the FCC sets forth its analysis for lifting the payment restriction on the sale of unbuilt stations. Part of that argument is a reaffirmation of the view that a permittee does not, in the constitutional sense, hold “property rights” in its authorization, but does hold a legal interest of value. *Report and Order*, at ¶¶30 - 34. This means that a permittee with a valid authorization pursuant to, say, one extension of its construction deadline, has no superior property rights to a permittee whose authorization has been extended, say, five or six times. Yet, under the New Extension Policy, a permittee in the first category is preferred.

Conversely, the FCC’s justification for lifting the payment restriction at this juncture is a recognition that a permittee, having invested time and money toward construction, holds an interest of value for which it should be paid in a sale. It is not uncommon, however, for a permit to have greatest value where the impediments to

construction are most oppressive, and thus where extensions are most appropriate. Yet the *Report and Order's* New Extension Policy undermines that dynamic.³

Third, there is a genuine question as to whether the FCC has, in connection with the narrow issue we have been discussing, complied with the notice and comment requirements of the APA. The APA requires agencies to provide notice and an opportunity to comment on proposed rules. *See* 5 U.S.C. § 553(c); *see also McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988). Moreover, an agency must "demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant." *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455 (D.C. Cir. 1998). *See also Professional Pilots Fed'n v. FAA*, 118 F.3d 758, 763 (D.C. Cir. 1977); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

In *National Tour Brokers Ass'n v. United States*, 591 F.2d 896 (D.C. Cir.1978) the District of Columbia Circuit observed that the APA's requirement of a chance to comment serves two purposes: "(1) to allow the agency to benefit from the expertise and input of the parties who file comments with regard to the proposed rule, and (2) to see to it that the agency maintains a flexible and open-minded attitude towards its own rules."

Id. at 902.

³ The problems only multiply if other FCC policies are introduced into the equation. For instance, we are aware of cases in which minority permittees of broadcast facilities would, but for the flexible standard of Section 73.3534, have long since forfeited their permits under a test such as the New Extension Policy.

In the *NPRM*, the FCC indicated its tentative decision to continue to apply the existing version of Section 73.3534 to permits beyond their initial term. The Commission's explanation of the basis for this approach was that, in its expert view, any alternative would be "administratively unworkable." Nowhere in the *NPRM* did the FCC even hint at the possibility that it might settle on a rule which accommodates permits that are beyond the initial term, but only if that period is less than three years from the date of grant of the application.

A rule introduced in this crabwise fashion is legally infirm. Notice of the nature of a proposed rule change must be clear and to the point. *See, e.g., AFL-CIO v. Donovan*, 757 F.2d 330, 339 (D.C. Cir. 1985) ("no notice, much less adequate notice" where agency reprinted entire set of regulation in 40 pages of the Federal Register, including the proposed change but not identifying it in the preamble, which highlighted other proposed changes); *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 899 (D.C. Cir. 1978) (notice inadequate since it indicated that agency intended to suggest congressional amendments of its enabling act rather than new administrative rules); *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 291 (3d Cir.1977) (notice did not state manufacturing processes to be covered by the proposed regulations); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549-50 (D.C. Cir.1983) (same--notice requirement not "an elaborate treasure hunt").

Fourth, the version of the New Extension Policy adopted in the *Report and Order* is problematic on retroactivity grounds. The APA requires that legislative rules, *i.e.*, rules

adopted pursuant to the notice and comment procedures of the APA, 5 U.S.C. §553, be given prospective effect only. Equitable considerations are irrelevant to the determination of whether the agency's rule may be applied retroactively. Retroactive application is categorically foreclosed by the express terms of the APA. *See, Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987).

Application of the New Extension Policy in the fashion adopted in the *Report and Order* subjects a party who has held its permit for more than three years to imminent risk of the loss of the permit by automatic cancellation. That is a liability which is newly created by the imposition of the New Extension Policy on permittees in this class. As such, it is impermissibly retroactive. *See, Landgraf v. USI Film Prods.*, 114 S.Ct. 1483, 1505 (1994).

Specifically, the formula announced in the *Report and Order* has a retroactive effect because it reaches back three years into the history of a permittee that was laboring under the reasonable belief that its actions would be judged under the "one in three" standard. Now, however, the permittee's reasons for having been unable to complete construction will include only the limited category listed in the "tolling" section of the *Report and Order*.

Perhaps construction has been delayed due to protracted negotiations with local residents and hearings before local zoning authorities. The permittee could not have known that, in late 1998, the FCC would decide that such procedures would toll the running of the construction period only if the permittee took the zoning board to court.

If the permittee had known that the court action would be required to qualify for tolling, it would have filed suit at an early stage, even though such litigation might have hindered the permittee's ability to work out an amicable resolution of the concerns expressed by community groups.

* * *

III. AN ILLUSTRATIVE CASE

Brunson is the permittee of television station WGTW, Channel 48, Burlington, New Jersey.⁴ Brunson will not be adversely affected by final adoption of the New Extension Policy, because it has completed construction of WGTW. However, Brunson's President and sole owner, Dorothy Edwards Brunson, has taken a leading role among minority television broadcasters.⁵ As such, Brunson believes that it is appropriate for it to bring to the attention of the Commission the way in which the New Extension Policy will harm a number of minority broadcasters. In addition, this petition will serve to provide the Commission with the benefit of Brunson's experience in building WGTW, as an

⁴ Brunson is a permittee rather than a licensee even though WGTW has been on the air since 1992. This is because the Commission has not yet had time to dispose of pleadings filed against the license application by a losing applicant in the comparative hearing proceeding that led to a grant of Brunson's construction permit application. The matters raised in those pleadings are not germane to the points developed in this petition. For one thing, the New Extension Policy has no bearing on stations like WGTW that are already on the air.

⁵ Mrs. Brunson has, for example, served as President of the National Association of Black-Owned Television Stations.

illustration of how the imposition of the New Extension Policy could work unintended results.

Brunson received a final grant of the permit for construction of WGTW in 1988. In the best of all possible worlds, Brunson would have been able to put WGTW on the air within three years, the term posited in the New Extension Policy. Since this is not the best of all possible worlds, events beyond the control of Brunson caused the permittee to take four years to get the station on the air.

First, Brunson was hindered in getting on the air because tower space in the tiny area where the transmitting facilities for Channel 48 could be located was extremely limited. A religious group that was one of the other losing applicants for Channel 48 had acquired the only tower that made practical sense. Because this group was convinced that a miracle would deliver the Channel 48 permit into its hands, it attempted to negotiate a lease of tower space that would provide a mechanism for the miracle to occur upon the least misstep by Brunson. Over two years were required to negotiate the final lease, under which Brunson was forced to grant free airtime to the religious.

In the meantime, the loan officer who had granted Brunson financing encountered health problems, and his replacement not only had no interest in financing television stations of any kind, but was hostile to minority borrowers such as Brunson. Thus, Brunson was forced to seek alternative financing in the midst of the 1991 recession. If those providing funds for Brunson had been told that their investment would be lost if

construction were not completed by the 365th day of the third year, Brunson would not have been able to secure the needed funds.

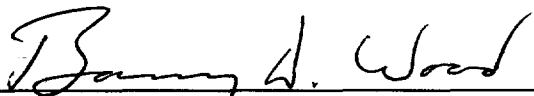
The former policy allowed Brunson to toll the date for completion of construction on account of these factors. The New Extension Policy would not be as flexible. That may not be of overwhelming concern as to permittees who have advance notice of what standards will apply during the terms of their construction permits. However, it would have been manifestly unfair to have announced to Brunson, in, say, November of 1991, as it was refurbishing the transmission line that its three year period to build the station had already run out!

IV. CONCLUSION

Accordingly, in order to address the foregoing problems, the FCC should reconsider that portion of the *Report and Order* discussed herein.

Respectfully Submitted,

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January 19, 1999

CERTIFICATE OF SERVICE

I, Candace J. Lamoree, hereby certify that on this date I caused the foregoing "Petition to Reconsideration" to be served by U.S. first class mail, postage prepaid, on the following:

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Dated: January 19, 1999